IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN, ROBERT B. ESSEX, FLORENCE FLAST, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, MARTHA LATIES, BLANCHE LEWIS, ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON, and CHARLES H. SUMNER,

Appellants,

against

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN GALLMAN, as Commissioner of Taxation and Finance of the State of New York,

Appellees,

and

GERALDINE M. BOYLAN, PRISCILLA L. CHERRY, JOAN M. DUCEY, NORA H. FERGUSON, ANGELINA M. FERRARELLA, ERNEST E. ROOS, JR. and ADAMINA RUIZ,

Appellees,

and

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO AFFIRM ON BEHALF OF APPELLEE SENATOR EARL W. BRYDGES

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Pursuant to Rule 16 of the Rules of this Court, the Appellee, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, herein moves to affirm so much of the judgment of the Court below as declares constitutional Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State and grants summary judgment and dismisses Appellants' complaint with respect to such sections, on the ground that the question upon which review is sought has been rendered so unsubstantial by the well-reasoned opinion of the District Court that no further review by this Court is necessary.

Question Presented

The question presented in this appeal is the constitutionality under the First Amendment of Sections 3, 4 and 5 of Chapter 414 of 1972 Laws of New York State, which provide tax credits for tuition paid by parents for their children enrolled in nonpublic schools.

Statement of the Case

Appellee, Senator Earl W. Brydges, is the Majority Leader and President Pro Tem of the New York State Senate.

On May 25, 1972, Appellants, allegedly taxpayers of New York State, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia,* that defendants, Ewald B. Nyquist, Commissioner of Education, Arthur Levitt, Comptroller, and Norman Gallman, Commissioner of Taxation and Finance, of the State of New York, be permanently enjoined from according tax benefits, pursuant to Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State to

partially alleviate the financial burden on parents for educating their children in nonpublic schools.

Parents of children enrolled in nonpublic schools, namely, Geraldine M. Boylan, Priscilla L. Cherry, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr. and Adamina Ruiz, were permitted to intervene as parties defendant. Similar permission was granted to Appellee, Senator Earl W. Brydges, Majority Leader and President Pro Tem of the New York State Senate.

On June 20, 1972, a three-judge District Court consisting of Hon. Paul R. Hays, a U. S. Circuit Judge; Hon. John M. Cannella and Hon. Murray I. Gurfein, U. S. District Judges, was duly constitued, pursuant to 28 U.S.C. §2281 and §2284, on consent of all parties. A hearing on the merits was held on July 6, 1972.

On October 2, 1972, Judge Gurfein handed down an opinion, with respect to tax credits, concurred in by Judge Cannella, declaring, *inter alia,* that Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State do not violate the Establishment Clause of the First Amendment. Judge Hays dissented in a separate opinion.

In upholding the constitutionality of tax credits for tuition paid by parents to nonpublic schools, the majority opinion reasoned, in part, as follows:

> "The third part [Sections 3, 4 and 5] of the statute, the tax credit for tuition paid by parents to nonpublic schools, we think stands in different case. In the first place, it is not restricted to areas which by concession are known to contain practically only Catholic parochial schools as in Part I. It covers attendance at *all* non-profit private schools *in the State,* Second, it does not involve a subsidy or grant of money *from the State Treasury* as in Parts I

and II. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. See *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). Fourth, the benefit to the parochial schools, if any, is so remote as to not involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines."

ARGUMENT

There is little to add to Part III of the incisive majority opinion of the Federal District Court below with respect to the constitutionality of tax credits, which are provided for by Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State. The arguments raised by Appellants in their Jurisdictional Statement are basically a reiteration of those points contained in the dissenting opinion of Judge Paul R. Hays, which were specifically addressed and answered in the majority opinion. Appellee, therefore, relies in the main on Part III of the majority opinion of the Federal District Court for the Southern District of New York in support of his motion to affirm. Appellee wishes, however, to make these following additional arguments.

It is well settled that a state has very wide latitude in exercising its taxing power and in making exemptions from such taxes and that unless the classification is so palpably arbitrary and irrational that it serves no legiti-

mate state interest, the courts will not interfere in such matters. Any ground of difference having a fair and substantial relation to the object of the legislation is all that is required to sustain such classification, since all persons similarly situated are treated alike. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237 (1890); *Rogers* v. *Hennepin County,* 240 U. S. 184, 191 (1916); *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37, 40 (1928); *Allied Stores* v. *Bowers,* 358 U. S. 522, 526-528 (1959). In the latter case, the court found that exempting non-residents' merchandise in storage was a valid exercise of tax power by the state. The constitutional principles pertaining to a state's taxing authority was well stated by the Court in *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509-510 (1931):

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. (Citation omitted). This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation. (Citations omitted).
>
> "Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis,* and when subjected to judicial scrutiny they must be presumed to *rest on that basis if there is any conceivable state of facts which would support it.* (Citations omitted).
>
> "The restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the

enactment of laws, has the widest possible latitude within the limits of the Constitution. . . ." (Emphasis added).

The proper question is therefore whether the offering of a tax incentive to parents to expend their own funds on tuition of their children and thereby save the state substantial expenditure is a rational basis for granting such parents a tax credit for a small fraction of the savings inuring to the state.

The time may have arrived for a soul-searching examination into whether the "establishment" clause with all of the judicial gloss placed on it need be further expanded to stifle the will of the democratic organs to offer minimal assistance to parents who choose the parochial school over the public school. (See Concurring Opinion of Harlan, J., in *Walz* v. *Tax Commission,* 397 U. S. 690, 699 (1970).

It is respectfully submitted that this Court need not be the one to erect a barrier to the ability of parents to effectively exercise their constitutional prerogatives.

CONCLUSION

The judgment of the District Court should be affirmed with respect to the constitutionality of Sections 3, 4 and 5 of Chapter 414 of the 1972 Laws of New York State because its decision has rendered unsubstantial the question which the appellants ask this Court to review.

Dated: November 20, 1972

Respectfully submitted,

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